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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 740

MARINA MERCANTE NICARAGUENSE, S. A., as Owner of the Motor Vessel "EL SALVADOR",

Petitioner,

v.

McALLISTER BROTHERS, INC., as owner of the Tug "RUSSELL NO. 18", VIRGINIA RUTH EVANS, THERESA F. SALVESEN and CATHERINE MARIE FARGO,

Respondents.

BRIEF OF RESPONDENTS, THERESA F. SALVESEN AND CATHERINE MARIE FARGO, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents, Theresa F. Salvesen and Catherine Marie Fargo are the widows and personal representatives of Carl A. Salvesen and Frank Fargo, deceased. On behalf of themselves and their nine children, they oppose the petition herein and by this brief urge that the damage issue was correctly and fairly resolved by the Court of Appeals. Such issue, to which this brief will be confined, was extensively presented by respondents in the Court Below by brief and oral argument.

Question Presented

Whether in a death case, where the deceased was of the lower or middle income status, under-compensation would result from the deduction of income tax from prospective earnings, in determining the reasonable expectation of pecuniary support, of which the beneficiaries have been deprived.

Statement

The Trial Court awarded, on account of future pecuniary losses, to respondent Salvesen $92,917.00 and to respondent Fargo $96,345.00. It made brief reference to the matter of deducting income taxes, "proper adjustment should be made for taxes", and, in a sub-note, stated that decisions of the Court of Appeals for the Second Circuit were "inapplicable" [248 Fed. Supp. 15 pp. 26, 31, 34].

The Court of Appeals, perceiving that the Trial Court had misconceived its decisions, held that they were applicable and modified the decree below "to restore the sums deducted for taxes on future income" [Petition Appendix pp. 44-46]. This resulted in an increase of pecuniary losses in the Salvesen claim by the amount of $15,935.00 to $108,852.00, and in the Fargo claim by the amount of $17,246.67, to $113,591.67. Thus, the two widows and their nine children gained by their appeals, the sum total of $33,181.67.

Reasons for Denial of the Writ

1. No conflict of authorities is put forward as a reason for granting the writ. In fact not one authority is cited by petitioner in its brief argument on the point of damages at pages 28 and 29 of the petition. No decision of the Second Circuit or of any other is examined to demonstrate a conflict requiring the granting of the writ. Petitioner

merely states, at page 29 of its petition, that the question "affects a great deal of litigation which is pending in the Courts all over the nation", and thus warrants review. Such generality has never been valid reason for taking up this Court's time or subjecting innocent litigants in death actions to further extended delay. This matter arose more than four years ago and the death claimants have yet to receive any compensation for the loss of their husbands. It is submitted that the petition, on this point of damages, wholly fails to meet the test and that its denial should bring to an end the protracted litigation.

2. Petitioner states [at page 28] that the Court of Appeals disallowance of deduction of income taxes was "unrealistic" because it "was dependent solely upon whether the decedent could be considered a high-wage earner or not." This statement, in fact the petition in its brief argument on the damage question, fails to take into account that under-compensation results, in low or middle income cases, when taxes are deducted from projected gross earnings. As the Court of Appeals pointed out, in its reference to *McWeeney* v. *New York N.H. & H. R. R.*, 282 Fed. 2d 34 [2 Cir.], cert. denied, 364 U. S. 870 [1960], estimated future income taxes should not be deducted in lower or middle income cases where future income is fairly predictable, added exemptions or deductions drastically affect the tax and the plaintiff is almost certain to be undercompensated for loss of earning power in any event. The Court noted also that deduction of the income tax on the estimated earnings *simpliciter* took no account of the tax on the income from the lump sum awards given to replace them. This, it said, was a factor particularly important in death cases, both because the loss of earnings is total and because the income from the lump sum will be taxable without benefit of income splitting unless the surviving spouse remarries [Petition Appendix p. 44]. Such reasoning of the Court of Appeals, we submit, is in every aspect realistic and petitioner's bland argument to the contrary should be rejected.

3. Petitioner's statement, at page 29, that the Court of Appeals was in error, in the absence of an abuse of discretion by the Trial Court and a showing that the damage awards were inadequate, is equally unsupportable. The Court pointed out that most of the reasons for the rule adopted in *McWeeney* [*supra*] are equally pertinent when the award is by a judge—perhaps even more so since the judge attempts accurate calculations, unlike the round figure formula employed by a jury [Petition Appendix p. 45]. Certainly, the Court of Appeals was not in error in correcting the decision below, based, as it was, on a misconception of the higher Court's rule. And as to whether the damages were inadequate, it is clear that they were so shown by these respondents.

4. The statement in the petition, at page 29 that "minimum amounts were deducted to cover taxes and personal expenses of the decedents" is wholly unsupported by record reference. Similarly, in arguing that the Court of Appeals' "holding is inconsistent with the law", the petition lacks validity for, as already noted, not one decision of any Court is cited for this or any law statement made by petitioner.

CONCLUSION

For the reasons stated a writ of certiorari on the issue of damages should be denied.

Respectfully submitted,

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Attorney for Respondent,
Theresa F. Salvesen.

ROBERT A. LILLY,
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